No. 82-1127

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

HELICOPTEROS NACIONALES DE COLOMBIA, S.A.,
Petitioner,

v.

ELIZABETH HALL, *et al.*,
Respondents.

On Writ Of Certiorari To The Supreme Court Of Texas

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Whether a Texas court constitutionally may assert *in personam* jurisdiction over a nonresident Colombian corporation where the plaintiffs' wrongful death actions arose out of a helicopter accident in Peru and where the Colombian corporation's sole contacts with Texas involved equipment purchases from a third party Texas corporation and a single contract discussion with decedents' employer in Texas and where plaintiffs' causes of action did not arise out of these contacts.

2. Whether the due process and equal protection clauses of the Fourteenth Amendment are violated by the exercise of *in personam* jurisdiction over a nonresident alien corporation under circumstances in which a nonresident United States corporation could not constitutionally be subjected to jurisdiction.

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OPINIONS BELOW

The final opinion of the Supreme Court of Texas appears in the joint appendix (hereinafter referred to as "J.A.") with the concurring opinion of Justices Campbell and McGee and the dissenting opinion of Justice Pope in which Chief Justice Greenhill and Justice Barrow joined.[1] (J.A. 184a-211a).

The final opinion of the Supreme Court of Texas is reported at 638 S.W.2d 870 (Tex. 1982). The opinion of

[1] The initial opinion of the Supreme Court of Texas (which was withdrawn on respondents' motion for reconsideration) and the opinion of the Court of Civil Appeals of the State of Texas appear in the appendix to the petition for a writ of certiorari (hereinafter referred to as "P.A."). (P.A. 46a-57a, 63a-71a). The directive of the trial court, the District Court of Harris County, Texas, for an order denying petitioner's motion to dismiss on grounds of lack of *in personam* jurisdiction appears at J.A. 164a.

the Court of Civil Appeals is reported at 616 S.W.2d 247 (Tex. Ct. Civ. App. 1981).[2]

JURISDICTION

On October 6, 1982, the Supreme Court of Texas denied petitioner's motion for reconsideration of its July 21, 1982 judgment. (P.A. 74a-75a). A petition for a writ of certiorari was filed on January 4, 1983, and was granted on March 7, 1983. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1257(3) (1976).

CONSTITUTIONAL PROVISION INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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[2] The following persons and entities were parties before the Texas Supreme Court: Elizabeth Hall, individually and as next friend of Delbert Hall, a minor; Susan Carol Porton; Harve Porton and Verda Ola Porton, individually and as next friends of Jeffery Taylor Porton, a minor; Naomi Lewallen, individually and as next friend of Ginger Lewallen, a minor; Gary Lewallen; Louise C. Moore (appellants); and Helicopteros Nacionales de Colombia, S.A. (appellee).

Helicopteros Nacionales de Colombia, S.A., is a Colombian corporation. Aerovias Nacionales de Colombia (known as Avianca) owns approximately 94 percent of Helicol's capital stock. The remainder of its stock is held by Aerovias Corporacion de Viajes and four South American individuals. Petroleum Helicopters de Colombia is a subsidiary of Helicol. SUP. CT. R. 28.1.

STATEMENT OF THE CASE

On January 26, 1976, a helicopter owned by Helicopteros Nacionales de Colombia, S.A. (hereinafter Helicol) crashed in Peru. Respondents' decedents died in the accident. (J.A. 5a).[3] Respondents, decedents were United States citizens domiciled in states other than Texas. (J.A. 182a).[4] At the time of their deaths, they were employed by Consorcio and working in Peru in connection with Consorcio's contract with Petro Peru, the Peruvian state-owned oil company. (J.A. 100a, 185a). Under this contract, Consorcio was to construct a pipeline from the jungles of Peru to the Pacific Ocean. (J.A. 100a, 145a).

To perform the work on the Peruvian pipeline, Williams-Sedco-Horn, a joint venture made up of three American companies, with an office in Houston, Texas, had formed a consortium under Peruvian law which operated under the name "Consorcio," as Peruvian law forbade construction of the pipeline by a non-Peruvian company. (J.A. 12a, 158a, Ex. admitted, Transcript of Special Appearance Hearing pp. 216-17). Consorcio designated Lima, Peru, as its legal residence. (J.A. 12a, Ex. admitted, Transcript of Special Appearance Hearing p. 217).

Helicol is a Colombian corporation with its principal place of business in Bogota, Colombia, and is in the business of providing helicopter transportation in South America to oil and construction companies. (J.A. 11a, Ex. admitted, Transcript of Special Appearance Hearing p. 217, 30a, 32a, 57a).

Helicol was initially contacted in South America by a member of Consorcio, Williams International Sundamer-

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[3] *See also* Petitions of Plaintiffs Susan C. Porton, *et al.*, Naomi Lewallen *et al.*, and Louise C. Moore, in the record of the court below.

[4] *Id.*

ica, Ltd. (hereinafter Williams), a construction company headquartered in Oklahoma. Helicol had previously done business with Williams in South America. (J.A. 62a-63a). Helicol was asked to send an officer to Tulsa, Oklahoma, to discuss a potential contract for helicopter services in Peru necessary for the construction of the pipeline. (J.A. 59a, 64a, 102a-103a). After the meeting in Tulsa, Helicol's officer, at Williams' request, flew to Houston, Texas, on Williams' corporate aircraft to meet with the other members of Consorcio. (J.A. 64a-65a, 104a-105a). Some preliminary contractual discussions occurred at the Houston meeting. (J.A. 65a-67a, 113a). Thereafter, a contract was finalized and signed in Peru on November 11, 1974, by Helicol's Peruvian lawyer and by a Peruvian resident representing Consorcio. (J.A. 113a, 120a-121a).

Prior to its execution, the contract had been approved by the Peruvian Air Force, as required by Peruvian law. (J.A. 61a-62a). It was written in Spanish on official government stationery and provided that the residence of all parties to the contract would be Lima, Peru, and further provided that controversies arising out of the contract would be submitted to the jurisdiction of Peruvian courts. (J.A. 12a, Ex. admitted, Transcript of Special Appearance Hearing p. 217, 59a, 60a, 62a-63a). It also provided that Consorcio would make payments to Helicol's account with the Bank of America in New York City. (J.A. 15a, Ex. admitted, Transcript of Special Appearance Hearing p. 217, 68a)

In the record of the courts below, the following facts were not disputed:

1. Helicol has never performed any of its business or helicopter operations in Texas (J.A. 25a-26a, Ex. admitted, Transcript of Special Appearance Hearing pp. 216-17, 40a, 43a, 182a);

2. Helicol has never solicited any business in Texas (J.A. 40a, 41a, 158a);

3. Helicol has never sold any products that reached Texas (J.A. 57a, 182a);

4. Helicol has never been authorized to do business in Texas and has never had an agent for the service of process in Texas (J.A. 41a-42a, 58a);

5. Helicol has never had any employees based in Texas and has never recruited employees in Texas (J.A. 40a, 54a);

6. Helicol has never owned real or personal property in Texas (J.A. 22a, Ex. admitted, Transcript of Special Appearance Hearing pp. 216-17, 42a, 57a);

7. Helicol maintained no office or establishment for the purposes of making purchases within Texas or for any other purpose and maintained no records within Texas (J.A. 35a, 42a, 54a, 57a);

8. The contract between Helicol and Consorcio was executed in Peru to be performed in Peru (J.A. 25a-26a, Ex. admitted, Transcript of Special Appearance Hearing pp. 216-17, 42a, 67a);

9. Payment for helicopter services in Peru rendered to Consorcio was made to Helicol, pursuant to the contract terms, by deposit of funds in a New York bank specified by Helicol (J.A. 15a, Ex. admitted, Transcript of Special Appearance Hearing p. 217, 51a);

10. The only business transactions ever entered into in Texas by Helicol which were identified in the record below were the purchases of several Bell helicopters and associated equipment which included transitional training on the operational characteristics and maintenance requirements of the purchased equipment (J.A. 24a-25a, Ex. admitted, Transcript of Special Appearance Hearing pp. 216-17, 43a-44a, 90a, 93a-95a, 98a, 124a);

11. The tort causes of action sued upon arose out of a helicopter accident in Peru (J.A. 5a, 146a, 178a);

12. Neither respondents nor respondents' decedents were or are residents or citizens of Texas. (*See generally* J.A. 182a, 185a, 189a).

Respondents filed four wrongful death actions in the District Court of Harris County, Texas, claiming that negligence on the part of Helicol proximately caused the helicopter accident in Peru on January 26, 1976, in which respondents' decedents died. (J.A. 5a, 184a).

Helicol filed special appearances and moved to dismiss respondents' actions for lack of *in personam* jurisdiction. (J.A. 9a, 184a). After an evidentiary hearing, Helicol's motions were denied. (J.A. 164a). Respondents' actions were thereafter consolidated for trial and judgment subsequently was entered against Helicol in a jury verdict in favor of respondents. (J.A. 165a-174a). Bell Helicopter, the manufacturer of the helicopter involved in the action, was dismissed at the close of the respondents' case by directed verdict. (J.A. 167a).

On January 22, 1981, the Court of Civil Appeals reversed the judgment of the trial court and held that the trial court lacked *in personam* jurisdiction over Helicol. (J.A. 175a-183a).

On February 24, 1982, the Texas Supreme Court affirmed the decision of the Court of Civil Appeals. (P.A. 46a-62a). The respondents thereafter moved for reconsideration of the decision. The Supreme Court of Texas, on July 21, 1982, reversed itself, withdrew its earlier opinion and filed a second opinion reversing the judgment of the Court of Civil Appeals and affirming the decision of the trial court. (J.A. 184a-190a). Justice Campbell filed a concurring opinion in which Justice McGee joined. (J.A. 191a-197a). Justice Pope filed a dis-

senting opinion in which Chief Justice Greenhill and Justice Barrow joined. (J.A. 198a-211a). Helicol then moved for reconsideration which the Supreme Court of Texas denied on October 6, 1982, with three justices dissenting. (P.A. 74a-75a).

The Supreme Court of Texas, in reaching its decision that personal jurisdiction could properly be exercised over Helicol by the Texas trial court, determined that the Texas long-arm statute, Tex. Rev. Civ. Stat. Ann. art. 2031b (1982) (P.A. 76a-78a), permitted Texas courts to exercise jurisdiction to the fullest extent permitted by the Constitution, citing *U-Anchor Advertising, Inc.* v. *Burt*, 553 S.W.2d 760 (Tex. 1977).

This determination was disputed by the dissenting justices, who stated: "Article 2031b requires a *nexus* between the helicopter crash and the contacts relied upon to justify jurisdiction." (emphasis in original) (J.A. 199a). The dissenting justices found that there was no such nexus.

The Texas Supreme Court went on to hold, however, that "Helicol's numerous and substantial contacts do constitute 'doing business' in this State and the trial court's actions do not offend due process." (J.A. 190a).

In his initial concurring opinion (J.A. 191a), Justice Campbell stated that federal due process with respect to *in personam* jurisdiction may be applied differently where the defendant is an alien resident of a foreign country rather than a United States citizen. (J.A. 193a). This rationale was challenged by Helicol in its motion for reconsideration and rejected by three of the justices of the Texas Supreme Court. (J.A. 210a-211a).

A petition for a writ of certiorari was filed by Helicol on January 4, 1983. The petition was granted on March 7, 1983. (J.A. 212a).

SUMMARY OF ARGUMENT

The principles of *in personam* jurisdiction over nonresident defendants laid down by the Court in *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945), through *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286 (1980), were violated by the Texas Supreme Court's decision upholding the exercise of *in personam* jurisdiction over Helicol in this case.

As a matter of due process, the exercise of jurisdiction over a nonresident corporate defendant has not been permitted unless the defendant was engaged in "substantial" and "continuous" business activity in the forum where the cause of action did not arise from the defendant's activities in the forum. *Perkins* v. *Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952). Where the nonresident corporate defendant's activities in the forum were not substantial and continuous, due process has required that there exist a relationship between the defendant's activities in the forum and the cause of action as a constitutional minimum for the exercise of *in personam* jurisdiction. *Worldwide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286 (1980); *Rush* v. *Savchuk*, 444 U.S. 320 (1980); *Kulko* v. *Superior Court*, 436 U.S. 84 (1978); *Shaffer* v. *Heitner*, 433 U.S. 186 (1977); *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945).

Helicol's contacts with the State of Texas, which consisted of helicopter purchases from a Texas vendor, with transitional training of its employees on the use of the purchased products, and a single contract discussion within the state, do not constitute "substantial" or "continuous" business activity under *Perkins* to permit the assertion of jurisdiction over Helicol for a tort cause of action arising in Peru. Thus a relationship between Helicol's contacts with the forum and the cause of action is

required. As no such relationship exists, the decision of the Texas Supreme Court constitutes a denial of due process and must be reversed.

To the extent that the Texas Supreme Court's decision was based upon the view that the due process to be afforded an alien corporation is less than that enjoyed by a United States corporation, the decision below is violative not only of the due process clause of the Fourteenth Amendment but also of the equal protection clause and must be reversed.

ARGUMENT

I.

THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT BARS THE EXERCISE OF *IN PERSONAM* JURISDICTION OVER HELICOL IN THESE ACTIONS AS HELICOL HAS NOT ENGAGED IN SUBSTANTIAL AND CONTINUOUS CONDUCT OF ITS BUSINESS IN THE FORUM AND NO RELATIONSHIP EXISTS BETWEEN THE DEFENDANT THE FORUM AND THE LITIGATION

A. A Nonresident Defendant Must Have Sufficient Contacts With The Forum Such That The Assertion Of Jurisdiction Over It Is Fundamentally Fair

The due process clause of the United States Constitution, which provides that no state shall deprive any person of "life, liberty or property without due process of law," limits the power of a state to assert *in personam* jurisdiction over nonresident defendants. *Pennoyer* v. *Neff*, 95 U.S. 714 (1877).

In *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945), the Court held that constitutional due process requirements are satisfied when *in personam* jurisdiction is asserted over a nonresident corporate defendant which has "certain minimum contacts with [the forum] such that

the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " 326 U.S. at 316, *quoting Milliken* v. *Meyer*, 311 U.S. 457, 463 (1940).

Prior to *International Shoe*, service of process on a defendant present within the forum was thought to be a prerequisite to the entry of a valid judgment against a defendant who was not a domiciliary of the forum. *See generally Pennoyer* v. *Neff*, 95 U.S. 714 (1877). If a corporate defendant had established a base of operations in the forum and was doing business there, through its agents, it was deemed to be "present" there, justifying the assertion of *in personam* jurisdiction over it, at least where the cause of action arose out of the defendant's activities in the state. *See Old Wayne Mutual Life Association* v. *McDonough*, 204 U.S. 8 (1907); *St. Clair* v. *Cox*, 106 U.S. 350 (1882).

International Shoe held that presence was no longer required for the exercise of *in personam* jurisdiction over nonresidents where the cause of action arose from forum contacts. Two lines of cases subsequently developed: (a) those involving the assertion of jurisdiction over a nonresident defendant because of the relationship or connection between the defendant's contacts with the forum and the cause of action sued upon, sometimes referred to as specific jurisdiction; and (b) those involving the assertion of jurisdiction over a defendant because of the relationship of defendant with the forum, whether or not the cause of action arose from defendant's forum contacts, sometimes referred to as general jurisdiction.[5]

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[5] *See* von Mehren and Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1136 (1966) (hereinafter referred to as *von Mehren and Trautman*).

A "relationship among the defendant, the forum and the litigation" has been the essential foundation of specific jurisdiction. *Shaffer* v. *Heitner*, 433 U.S. 186, 204 (1977). *See Rush* v. *Savchuk*, 444 U.S. 320 (1980); *Hanson* v. *Denckla*, 357 U.S. 235 (1958). On the other hand, general jurisdiction has historically been premised upon the defendant's domicile or residence and to some extent "presence" in the jurisdiction, or his consent to be subject to suit in the jurisdiction.[6]

B. Specific Jurisdiction Is Not Present In The Case At Bar Because Petitioner's Contacts With Texas Did Not Give Rise To Respondents' Causes Of Action

It is undisputed that Helicol had some contact with the State of Texas. It purchased helicopters and spare parts from Bell Helicopter and its employees, on occasion, took delivery and received instructions on the purchased equipment in Texas. (J.A. 43a-44a, 90a, 93a-95a, 98a). In addition, a Helicol employee, a citizen and resident of Colombia, traveled to Texas to discuss a contract for helicopter transportation by Helicol in Peru. (J.A. 64a, 102a-105a).

However, respondents claims did not arise out of or relate to the purchases in Texas or to the contract discussion in Texas.[7] These claims arose out of the negligent

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[6] General jurisdiction is derived from defendant's relationship with the forum and not from the relationship between the cause of action and the forum. General jurisdiction has been premised upon three types of relationships with the forum: 1) domicile or habitual residence; 2) presence; or 3) consent. *von Mehren and Trautman* at 1137.

[7] A contact is "related to" the controversy or, as the concept is sometimes phrased, the cause of action "arises out of" defendant's contacts within the forum if the contact relates to a required element of plaintiff's case. *See generally* Shaffer v. Heitner, 433 U.S. 186

operation of a helicopter in Peru. Since the required link between Helicol's forum contacts and the cause of action is absent, there is no constitutional basis for specific jurisdiction. Thus the issue in this case is whether there is a basis for the exercise of general jurisdiction, namely Helicol's relationship or ties to the forum. This is the basis for jurisdiction relied upon by the Texas Supreme Court.

C. Petitioner's Relationship With The State Of Texas Does Not Provide A Basis For The Assertion Of General Jurisdiction

1. The *Perkins* decision requires substantial and continuous forum activity and ties to the forum before general jurisdiction may be asserted

The Court in *Perkins* v. *Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952), held that a corporation may constitutionally be amenable to general jurisdiction within a state when it establishes a base of operations in the forum from which it conducts continuous and substantial corporate activity.

An evaluation of Helicol's contacts with Texas in light of the criteria enunciated in *Perkins* demonstrates that contacts sufficient to invoke the general jurisdiction of the Texas courts are entirely lacking in the case at bar.

In *Perkins*, the defendant, a Phillipine mining company, had been forced to abandon its operations in the Phillipines during World War II. Its president had re-

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(1977); Hanson v. Denckla, 357 U.S. 235 (1958). Simply because a contact may provide a link in a historical chain of events leading to the injury, it does not satisfy the "relatedness" criteria needed for the assertion of specific jurisdiction. *See* Brilmayer, *How Contacts Count: Due Process Limitations in State Court Jurisdiction*, 1980 S.Ct. Rev. 77, 84. *See generally von Mehren and Trautman* at 1136, 1144.

turned to his home in Ohio where he conducted business on behalf of the company, drawing and distributing salary checks, using and maintaining two substantial bank accounts, receiving and preparing correspondence, holding directors' meetings in Ohio, supervising policies relating to the rehabilitation of the company and dispatching funds to cover the purchase of capital items. 342 U.S. at 447-48.[8]

The Court in *Perkins* quoted *International Shoe*, stating:

> [T]here have been instances in which the continuous corporate operations within a state were thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities.

342 U.S. at 446, *quoting International Shoe*, 326 U.S. at 318.

Although the Texas Supreme Court did not cite *Perkins*, it implicitly invoked *Perkins* by holding that jurisdiction was properly asserted because "defendant's presence in the forum through numerous contacts is of such a nature . . . so as to satisfy the demands of the ultimate test of due process." (J.A. 188a).

Stated the Court:

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[8] As one commentator has characterized *Perkins*, "it never offends traditional notions of fair play and substantial justice for a defendant to be sued in his own backyard, no matter where the cause of action arose. Admittedly in the case of corporate entities with major and continuous financial dealings in a state, the courts of that state may be tempted to find jurisdiction. Unless the cause of action arises out of contacts with the state, or unless a defendant is truly being sued in its own backyard, however, no jurisdiction should lie based on unrelated contacts." Newton, *Conflict of Laws*, 34 Sw. L. J. 385, 394 (1980).

> Helicol's numerous and substantial contacts do constitute "doing business" in this State and the trial court's actions do not offend due process. (J.A. 190a).

2. Purchases are a qualitatively inadequate contact upon which to premise general jurisdiction

In contrast to the pervasive forum contacts present in *Perkins*, petitioner's Texas contacts consisted principally of purchases from Bell Helicopter Company. The question whether purchases within a forum provide a constitutional basis for the assertion of jurisdiction was addressed by the Court in *Rosenberg Brothers & Co.* v. *Curtis Brown Co.*, 260 U.S. 516 (1923). In *Rosenberg*, a pre-*International Shoe* case, the Court affirmed the lower court's decision that purchases within the forum did not constitute "presence" for the purpose of asserting jurisdiction, even where a cause of action arose out of the purchases. The Court stated:

> [Appellee's] only connection with [the forum] appears to have been the purchase there from time to time of a large part of the merchandise to be sold at its store [in another state] . . . The only business alleged to have been transacted [in the forum] . . . related to such purchases of goods by officers of a foreign corporation. Visits on such business, even if occurring at regular intervals, would not warrant the inference that the corporation was present within the State.

260 U.S. at 518. *See also Hutchinson* v. *Chase & Gilbert, Inc.*, 45 F.2d 139 (2d Cir. 1930) (L. Hand, J.).[9]

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[9] Respondents have themselves conceded that purchases cannot form the basis for *in personam* jurisdiction, stating: "If an alien corporation wishes to protect itself against the assertion of jurisdiction, it need only limit its activities to mere purchases." Brief of Respondents in Opposition to Petition for Writ of Certiorari, p. 6.

The fact that *Rosenberg* was decided under the pre-*International Shoe* "presence" test does not lessen its significance. The Court in *International Shoe* specifically commented on the nature of the contacts involved in *Rosenberg*, stating:

> [A]lthough the commission of some single or occasional acts of the corporate agent in a state sufficient to impose an obligation or liability on the corporation has not been thought to confer upon the state authority to enforce it [citing *Rosenberg*], other such acts, because of their nature and quality and circumstances of their commission, may be deemed sufficient to render the corporation liable to suit [citations omitted].

326 U.S. at 318.

Thus, the *International Shoe* decision implicitly affirmed the viability of the *Rosenberg* holding that purchases, becuase of their nature and quality, are not sufficient to permit the assertion of either specific or general jurisdiction.

Entering a state for the purpose of making sales and developing markets has been recognized as one of the "affiliating circumstances" justifying the exercise of specific jurisdiction. *See World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 295, 297-298 (1980). On the other hand, purchases of capital goods, or even inventory, in the forum for the purpose of conducting business elsewhere have usually been deemed insufficient to support specific jurisdiction. *See Rath Packing Co.* v. *Intercontinental Meat Traders*, 181 N.W.2d 184 (Iowa 1970); *Fourth Northwestern National Bank* v. *Hilson Industries, Inc.*, 264 Minn. 110, 117 N.W.2d 732 (1962); *Conn* v. *Whitmore*, 9 Utah 2d 250, 342 P.2d 871 (1959). *But see Henry R. Jahn & Son, Inc.* v. *Superior Court*, 49 Cal.2d 855, 323 P.2d 437 (1958).

Whether purchases in the forum are or should be "affiliating circumstance" justifying the exercise of specific jurisdiction, purchases by a nonresident from a forum vendor should not form a basis for general jurisdiction, absent some base of operation or presence in the jurisdiction such as existed in *Perkins*. This is especially true where, as here, the purchases were capital goods rather than inventory. The decisions which have held purchases to be a factor in determining whether the defendant was "doing business" were cases where the goods were purchased for resale and, for that reason, buying in the jurisdiction was considered by the courts in those cases to be doing business as much as selling. Annot., 12 A.L.R. 2d 1439 (1949).

General jurisdiction assumes permanent ties to the forum approaching domiciliary status. Purchases of products by nonresidents for use out of state does not create any ties with the state of purchase.

While the terms "doing business" and "presence" have been regarded as outdated concepts for purposes of specific jurisdiction, the concepts have validity where general jurisdiction is at issue. Corporate business activity has traditionally manifested itself by sales of goods and services, and sales have been an indicia of "presence" or "doing business." Purchases have not because they are usually incidental to a company's business activity. *See Tillay* v. *Idaho Power Co.*, 425 F.Supp. 376 (E.D. Wash. 1976).

An analysis of Helicol's purchases from Bell Helicopter Company demonstrates that the presence of Helicol's employees within the state was transient in nature. Helicol's purchases from Bell Helicopter were generally negotiated through Bell's agent in Colombia. (J.A. 98a). Helicol's employees traveled to Texas for the purpose of

receiving instruction on Bell equipment and to take delivery of the helicopters. (J.A. 94a-95a). From 1970 to 1976 only nine trips to Texas were taken by a total of fifteen Helicol employees to ferry Bell helicopters to Colombia. (J.A. 24a, P.A. 105a-107a, Ex. admitted, Transcript of Special Appearance Hearing pp. 216-17). During the same period, twelve Helicol employees took a total of fourteen trips to Texas for training and technical consultation in connection with the purchased equipment. (J.A. *id.*). Helicol had no employees whatsoever located or based in Texas. (J.A. 40a, 54a).

Helicol's business was providing helicopter transportation in South America. The purchases of capital items within the State of Texas were incidental to Helicol's helicopter transportation business. By these purchases, Helicol established no ties to the State of Texas. The presence of its employees was neither continuous or permanent. Helicol by these purchases was not "doing business" in the traditional sense of soliciting business and making sales. Helicol purchased capital equipment from Texas vendors in order to conduct its business elsewhere.

Apart from the policy reasons described on pages 23-24, *infra*, purchases in the forum by a nonresident create no ties with forum or presence justifying the exercise of general jurisdiction.

3. Helicol's other contacts with Texas are insufficient to support general jurisdiction

Putting aside purchases as a basis for general jurisdiction, the Court is left with only a single contract discussion and the receipt by Helicol of payments in New York in the form of drafts drawn upon a Texas bank by Helicol. A single contract discussion cannot constitute the "continuous" and "substantial" business activity envisioned by *Perkins*.

The Texas Supreme Court's reliance upon Helicol's receipt of contractual payments drawn on a Texas bank as a basis for the exercise of *in personam* jurisdiction was also misplaced. Drafts forwarded by Consorcio from Texas to Helicol's bank in New York for deposit do not constitute payments made in Texas. For its part, Helicol had no bank account for receipt of payments within Texas. Furthermore, the election by Consorcio to draw upon a Texas bank for the purpose of making payments in New York was its own. The unilateral act of a third party or the other party to the action cannot provide the basis of personal jurisdiction over a nonresident. *See, e.g., World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 206 (1980); *Kulko* v. *Superior Court*, 436 U.S. 84 (1978).

D. Principles Of Federalism Embodied In The Due Process Clause Prohibit Texas From Asserting Jurisdiction Over Helicol

The concept of "minimum contacts" sufficient to "satisfy traditional notions of fair play and substantial justice" performs the two essential due process functions:

> It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.

World-Wide Volkswagen Corp. v. *Woodson*, 444 U.S. 256, 292 (1980).

The two bases of jurisdiction previously discussed, specific jurisdiction based upon the relationship of the defendant's forum contacts with the controversy and general jurisdiction based upon defendant relationship with the forum, represent dual aspects of a forum's sovereignty.

In the first instance, a state may constitutionally assert jurisdiction over a cause of action arising out of activities within its borders. *See Pennoyer* v. *Neff*, 95 U.S. 714 (1877).

In the second instance, a state may constitutionally assert jurisdiction over its domiciliaries or entities which have, in effect, become forum domiciliaries. Requiring its own citizens to appear and defend on any cause of action constitutes an act of forum sovereignty which has been universally accepted. *Milliken* v. *Meyer*, 311 U.S. 457 (1940).[10]

Absent either of these forum "interests," the assertion of jurisdiction constitutes an affront to principles of federalism inherent in the due process clause.

In *World-Wide Volkswagen* the Court reiterated the importance of federalism;

> [W]e have never accepted the proposition that state lines are irrelevant for jurisdictional purposes, nor could we, and remain faithful to the principles of interstate federalism embodied in the Constitution.

444 U.S. at 293.

The legitimate forum interests recognized by the Court in *World-Wide Volkswagen*[11] were fundamentally misap-

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[10] It has been suggested that, when the defendant's contacts with the forum are "substantial and continuous," as in *Perkins*, concepts of fundamental fairness are not offended for the following reason. The defendant who is essentially being sued in his own back yard, is enough of an "insider" to be "safely relegated to the [forum] state's political processes." Brilmayer, *How Contacts Count: Due Process Limitations on State Court Jurisdiction*, 1980 S.Ct. Rev. 77, 87. For the same reason, fundamental fairness is not offended by the assertion of jurisdiction over a forum domiciliary.

[11] The Court in *World-Wide Volkswagen* indicated that the reasonableness of the burden on the defendant would be considered in light of other relevant factors, including the "forum state's interest

plied by the court below. The Texas Supreme Court found that the following forum interests would justify the assertion of jurisdiction: 1) Texas' interest arising out of respondents' status as United States citizens and the fact that their decedents were employees of a Texas resident;[12] 2) Texas' "interest in obtaining the most efficient resolution of controversies and in furthering fundamental substantive social policies"; and, 3) "Hall's genuine interest and desire in obtaining convenient and effective relief." (J.A. 189a).

The interests alluded to by the Texas Supreme Court constitute mere pretexts for the assertion of jurisdiction over Helicol. Neither respondents nor their decedents are or were Texas residents.

The Texas Supreme Court offered no support for its statement that Texas has an interest sufficient to justify the assertion of jurisdiction because it "seeks the most efficient resolution of controversies and the furtherance of social policies." Indeed, such vague and undefined interests could be said to be present in any case in which a state wished to assert jurisdiction.

Likewise, in every lawsuit the plaintiff has an interest in obtaining relief. Such an interest is of no jurisdictional consequence. The State of Texas has no recognizable

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in adjudicating the dispute . . ., the plaintiff's interest in obtaining convenient and effective relief . . ., at least when that interest is not protected by plaintiff's power to choose the forum . . .; the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental social policies" 444 U.S. at 292.

[12] This statement regarding decedent's employer is inaccurate. Decedents were employed by Consorcio at the time of their deaths. The legal residence of Consorcio was Lima, Peru. (J.A. 12a, Ex. admitted, Transcript of Special Appearance Hearing p. 217).

legal interest in a claim by nonresidents against a nonresident tortfeasor which arose in a foriegn country.

In sum, Texas has no legally recognizable interest in this litigation, evidenced either by a connection to the parties or the controversy, sufficient as a matter of constitutional due process to compel petitioner to defend this lawsuit in Texas.

II.

AN ALIEN NONRESIDENT CORPORATION IS ENTITLED TO THE SAME FEDERAL DUE PROCESS AND EQUAL PROTECTION OF THE LAWS AS ARE UNITED STATES CITIZENS AND TO THE EXTENT THE COURT BELOW HELD OTHERWISE ITS DECISION MUST BE REVERSED.

Although it is difficult to be certain of all of the reasons underlying the Texas court's final decision, the justices who filed a concurring opinion on July 21, 1982 (J.A. 191a) indicated that in their view, an alien nonresident corporation enjoys less due process than a United States corporation. Thus, the concurring justices reasoned, in the case of alien corporations, "our due process application must be broader in scope." (J.A. 193a).[13] While the foregoing language was changed in the West Publishing Co. reports, pursuant to the instructions of the Clerk of the Texas Supreme Court to West Publishing Co. on September 17, 1982, to "due process in this case must be universal in its application," the dissenting justices commented on the original language as follows:

> While this argument may appeal to those who believe that noncitizens should receive less due process than

[13] The concurrences by Justices Campbell and McGee were necessary to form a majority in favor of the assertion of jurisdiction. Thus, it appears that this view of due process formed a partial basis for the final decision in favor of respondents.

> United States citizens [citations omitted], it is nevertheless inconsistent with the way due process has been applied in previous cases. (J.A. 210a).

The view that aliens may be treated differently in due process terms than citizens, based simply on their alien status, has not found support in the courts of the United States. *See, e.g., Plyler* v. *Doe*, 102 S.Ct. 2382 (1982); *Jim Fox Enterprises* v. *Air France*, 664 F.2d 63 (5th Cir. 1981); *Prejean* v. *Sonatrach, Inc.*, 652 F.2d 1260 (5th Cir. 1981); *Hutson* v. *Fehr Brothers, Inc.*, 584 F.2d 833 (8th Cir. 1978), *cert. denied sub nom. Fehr Brothers, Inc.* v. *Acciaierie Weissenfels*, 439 U.S. 983; *Honeywell, Inc.* v. *Metz Apparatewerke*, 509 F.2d 1137 (7th Cir. 1975); *Product Promotions, Inc.* v. *Cousteau*, 495 F.2d 483 (5th Cir. 1974).

In *Plyler* v. *Doe*, 102 S.Ct. 2382 (1982), the Court determined that the equal protection clause was offended by the unequal educational treatment provided to nonresident aliens by the State of Texas. At the outset, the Court affirmed that the due process clause extended to anyone, "citizen or stranger who is subject to the laws of a State," and that "all such persons or entities are entitled to the equal protection of the laws that a State may choose to establish." 102 S.Ct. at 2394.

The Texas legislature, in passing the long-arm statute under which jurisdiction was herein asserted, Tex. Rev. Civ. Stat. Ann. art. 2031b, did not distinguish between United States citizens and foriegn nationals. Thus, for the Texas Supreme Court to have utilized such a distinction constitutes a denial to petitioner of the equal protection of the laws.

Furthermore, if the Texas statute did permit aliens to be treated differently than United States citizens, the equal protection clause would be offended as it requires

that such discriminatory state action bear some fair relationship to a legitimate public purpose. 102 S.Ct. at 2394.

Any legitimate public purpose to be served by such a classification, would require, if anything, that nonresident aliens be protected from such jurisdiction. The burden on the defendant, a critical factor in any due process analysis, will generally be more onerous if the defendant is forced to cross national boundaries, rather than merely state borders, in order to defend. *See generally Kulko* v. *Superior Court*, 436 U.S. 84, 97 (1978).

Alien status, rather than being a factor permitting due process to be more easily satisfied, will more likely dictate a contrary conclusion.

III.

THE DECISION OF THE TEXAS SUPREME COURT POSES A BARRIER TO INTERNATIONAL TRADE AS IT PERMITS THE ASSERTION OF JURISDICTION OVER A FOREIGN CORPORATION ON THE BASIS OF PURCHASES FOR CLAIMS ARISING OUT OF INCIDENTS OCCURRING OUTSIDE THE UNITED STATES

The decision of the Texas Supreme Court is not only repugnant to the Constitution but is unsound for policy reasons as well. The United States must compete in an increasingly less favorable international marketplace to sell its products to foreign purchasers. If mere purchases can form the basis for *in personam* jurisdiction where the cause of action asserted not only arises in a foreign country but is also unrelated to the purchases, American producers will be forced to bear the cost of such jurisdiction. American products may well become less competitive for they will come with a "hidden cost," *i.e.*, the cost of defending litigation in American courts, a cost foreign purchasers may be unwilling to pay.

The American judicial system will not be well-served by the assumption of general jurisdiction over alien corporations based on their purchases of American products. Assertions of jurisdiction on a basis as tenuous as purchases will inevitably yield judgments unenforceable in other countries.[14] Absent an applicable international treaty or the presence of defendant's assets within the jurisdiction, judgments against alien nonresident defendants are generally enforceable only on the basis of international comity. It is doubtful whether the United States would enforce a judgment entered in a foreign country where general jurisdiction was founded purely on the basis of purchases within that country.

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[14] International law principles generally dictate that a defendant must be sued in his own forum. This principle is expressed in the Roman law maxim, *actor forum rei sequitur* (the plaintiff must pursue the defendant in his forum). *See* M. WOLFF, PRIVATE INTERNATIONAL LAW 62-63 (2d ed. 1950).

CONCLUSION

For the reasons set forth above, the judgment of the Supreme Court of Texas should be reversed and the cause remanded with instructions to dismiss the actions for lack of jurisdiction.

Respectfully submitted,

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Dated: May 12, 1983

CERTIFICATE OF SERVICE

I, Thomas J. Whalen, being over the age of 18 years and a member of the firm of Condon & Forsyth, hereby certify that I have this twelfth day of May, 1983, served three copies of the foregoing Brief of Petitioner upon respondents Elizabeth Hall, *et al.*, the only parties required to be served, by mailing such copies to their attorney of record in sealed envelopes, first class postage prepaid, deposited at the United States Post Office, located at North Capitol and Massachusetts Avenue, N.E., Washington, D.C., and addressed as follows:

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